

NO. 85511-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LINDY DEER,

Respondent.

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STATE OF WASHINGTON

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Laura Gene Middaugh, Judge

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BY RONALD N. CASPER

STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. In a charge of rape of a child 3°, where the factual issue involves whether the adult defendant was awake and committed a volitional act or whether the 15-year-old child performed sexual intercourse with the adult while the adult was asleep, must this Court rely on the constitutional right of due process to allocate the burden of proof on the factual issue?

2. Does the statute defining rape of a child 3°, RCW 9A.44.079, require the State to prove beyond a reasonable doubt that the adult, and not the child, was the "perpetrator" of the prohibited act?

B. STATEMENT OF THE CASE

RCW 9A.44.079 provides:

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

According to the Supplemental Briefs of both parties, the State charged Lindy Deer, an adult woman, with multiple counts of rape of a child 3°, violations of RCW 9A.44.079, for incidents of

sexual intercourse that occurred with R.R., a 15-year-old boy.¹ At least some of the incidents involved R.R. leaving the couch where he was to sleep and climbing into bed with Ms. Deer after she was asleep. In the bed, acts occurred meeting the definition of sexual intercourse. RCW 9A.44.010(1).² It also was alleged that R.R. placed Ms. Deer's hand on his penis, which would be sexual contact. RCW 9A.44.010(2).

Ms. Deer's counsel notes that both Ms. Deer and R.R. testified Ms. Deer was asleep at the time of the intercourse. Suppl. Br. of Resp. at 3. The State portrays these facts as Ms. Deer succeeded in making R.R. believe she was asleep. Suppl. Br. of Pet. at 2-3. Ms. Deer's defense was that she was asleep during some of these incidents; and that R.R. had forced her to have sexual intercourse without her consent on others. Suppl. Br. of Pet. at 4.

Due to Deer's contention that she was asleep during at least one of the sexual encounters, Deer and the State

¹ There is no issue that Ms. Deer is more than 48 months older than R.R.

² All statutes are quoted in full in the Appendix.

proposed a jury instruction that would have required the State to prove beyond a reasonable doubt that she committed a "volitional" act.

State v. Deer, 158 Wn. App. 854, 859-60, 244 P.3d 965 (2010). Instead, the trial court instructed the jury the defendant had the burden of proving by a preponderance of the evidence that the child had intercourse with her without her knowledge or consent. Deer, 158 Wn. App. at 860.

The Court of Appeals accepted the State's concession of error on another issue that required reversing all counts. Should the case be retried, it stated in dicta that due process placed on the State the burden of proving beyond a reasonable doubt that Ms. Deer performed a "volitional act" of sexual intercourse, the *actus reas*, as an implied element of child rape 3°. State v. Deer, 158 Wn. App. at 862.

The State petitioned this Court to hold that rape of a child is "a strict liability offense" for which the defense bears the burden of proving by a preponderance of the evidence the defendant's lack of a volitional act. Suppl. Br. of Pet. at 20.

C. ARGUMENT

1. THIS COURT SHOULD NOT REACH A CONSTITUTIONAL ISSUE IF IT CAN DECIDE THE CASE ON NON-CONSTITUTIONAL GROUNDS.

The Court of Appeals and both parties approached this issue as one of constitutional due process regarding the common law concept of *actus reas*. "A court will not reach a constitutional issue if it can decide the case on nonconstitutional grounds." State v. Smith, 104 Wn.2d 497, 505, 707 P.2d 1306 (1985); Trummel v. Mitchell, 156 Wn.2d 653, 675-76, 131 P.3d 305 (2006). See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring).

The statute provides a resolution of this issue without having to "imply" elements because of due process. This Court should avoid the constitutional issue and interpret the statute.

2. RCW 9A.44.079 REQUIRES THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ADULT IS THE "PERPETRATOR" AND THE CHILD THE "VICTIM" OF THE ACT.

- a. Statutory Element

As quoted above, RCW 9A.44.079 requires the State to prove that "**the perpetrator** is at least

forty-eight months older than **the victim**" of the act of sexual intercourse. The Legislature used this same "perpetrator/victim" language for the crimes of rape in the third degree,³ rape of a child,⁴ child molestation,⁵ sexual misconduct with a minor,⁶ indecent liberties,⁷ and custodial sexual misconduct⁸.

Implicit in this statute is that **the perpetrator** is defined as **one who causes the other person to engage in the act** amounting to rape of a child

State v. Bobenhouse, 166 Wn.2d 881, 889, 214 P.3d 907 (2009) (emphases added) (holding defendant who caused two children to have sexual contact with each other was "the perpetrator" under RCW

³ RCW 9A.44.060.

⁴ RCW 9A.44.073 (rape of child 1°), RCW 9A.44.076 (rape of child 2°), RCW 9A.44.079 (rape of child 3°).

⁵ RCW 9A.44.083 (child molestation 1°), RCW 9A.44.086 (child molestation 2°), RCW 9A.44.089 (child molestation 3°).

⁶ RCW 9A.44.093 (sexual misconduct with minor 1°), RCW 9A.44.096 (sexual misconduct with minor 2°).

⁷ RCW 9A.44.100(d), (e), (f).

⁸ RCW 9A.44.160 (custodial misconduct 1°), RCW 9A.44.170 (custodial misconduct 2°).

9A.44.073, rape of a child 1°). Accord: State v. BJS, 72 Wn. App. 368, 371-72, 864 P.2d 432 (1994) (same for juvenile offender).

These statutes do not make criminal any "person" involved in sexual contact or intercourse. They implicate only "the perpetrator" of the acts. They do not all require the State to prove intent or knowledge,⁹ but they do require it to prove that the adult was "the perpetrator."

Thus for any of these crimes the State must prove who is "the perpetrator" and who "the victim." The statutes do not separately define the terms. When a statutory term is undefined, the court may look to a dictionary to give the word its ordinary meaning. State v. Gonzalez, 168 Wn.2d 256, 263-64, 226 P.3d 131 (2010).

PERPETRATOR. Generally, this term denotes the person who actually commits a crime or delict,¹⁰ or by whose immediate agency it occurs.

⁹ Indecent liberties requires that the defendant "knowingly causes" the sexual contact. RCW 9A.44.100.

¹⁰ **"DELICT.** In the Roman and civil law. A wrong or injury; an offense; a violation of public or private duty." Black's Law Dictionary at 514 (4th ed. rev. 1968).

Black's Law Dictionary at 1298 (4th ed. rev. 1968).¹¹

"Legislative changes can also be considered when determining legislative intent." Gonzalez, supra, 168 Wn.2d at 265.

When the Legislature enacted the child molestation and rape of child statutes, it intentionally chose the terms "perpetrator" and "victim" over the former statutory rape language of "persons" "engaging" in sexual intercourse. Former RCW 9A.44.070 provided:

(1) A person over thirteen years of age is guilty of statutory rape in the first degree when the **person engages** in sexual intercourse with **another person** who is less than eleven years old.

See State v. Abbott, 45 Wn. App. 330, 72 P.2d 988 (1986), review denied, 107 Wn.2d 1027 (1987).

b. "Strict Liability Crime"

The State refers to rape of a child in the third degree as a "strict liability" crime. Suppl.

¹¹ See also Nevada Revised Statutes § 200.364:

1. "Perpetrator" means a person who commits a sexual assault.

...
4. "Victim" means a person who is subjected to a sexual assault.

Br. of Pet. at 11.¹² To the extent this phrase means the State does not have to prove a specific *mens rea*, amicus does not challenge it. However, requiring proof that the defendant was the "perpetrator" requires something other than a traditional *mens rea*.

c. Factual Scenarios

The wisdom of the statute's language and structure easily is seen in a few hypothetical situations. A 30-year-old might be standing in an elevator, at a bus stop, or on a crowded bus, and a 15-year-old might reach from behind and place his hand on the adult's crotch or an adult woman's breast. This contact would constitute "sexual contact:"

"Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of

¹² The State relies on State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996), which held only that attempted rape of a child requires proof that the defendant intended to commit the act of sexual intercourse with the child. Nor did the defendant in Abbott, supra, claim he did not engage in sexual intercourse or that the child under age 11 committed the crime against him. Obviously that factual scenario is completely different from where the defendant claims, as here, that she was unaware the act occurred and the youth committed the act against her.

gratifying sexual desire of either party
or a third party.

RCW 9A.44.010(2).

Under common sense, the adult is a victim of a sexual assault committed by the juvenile. RCW 9A.44.100. However, under the state's "strict liability" theory, the adult would be guilty of child molestation in the third degree. RCW 9A.44.089.

If a person climbs into a sleeping adult's bed and commits sexual contact or oral sex on the sleeping adult, that action falls within the definition of indecent liberties or rape in the second degree.¹³ This factual scenario should not suddenly become child sexual abuse if the person awake is under the age of 16 and the sleeping adult over 20.

¹³ RCW 9A.44.100(1)(b) or RCW 9A.44.050(1)(b) ("when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated"). State v. Puapuaqa, 54 Wn. App. 857, 776 P.2d 170 (1989) (evidence that person was asleep permitted finding that victim was "physically helpless" for indecent liberties conviction).

3. THE STATE BEARS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE ADULT IS "THE PERPETRATOR" WHEN THE DEFENSE PRESENTS EVIDENCE NEGATING THAT STATUTORY ELEMENT.

The State claims the defense should bear the burden of proving by a preponderance of the evidence that the defendant committed no volitional act. In the rare case, however, in which an adult claims she did not perpetrate an act against a child, or that the child perpetrated sexual intercourse against her despite her expressed lack of consent,¹⁴ the defense theory negates the statutory element of the defendant being the perpetrator.

This situation is analogous not to drug possession cases, as the State argues,¹⁵ but to self-defense. State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984). Once the defense presents some evidence to negate this statutory element, the State must prove it beyond a reasonable doubt.

In order to properly raise the issue of self-defense, the defendant need only

¹⁴ The crime of rape in the third degree, RCW 9A.44.060.

¹⁵ Suppl. Br. of Pet. at 14-15.

produce 'any evidence' tending to prove that the homicide was done in self-defense. ... Although defendant needs to produce some evidence so as to raise the self-defense issue, he need not produce the amount necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense. ... A defendant's testimony alone is sufficient to raise the issue of self-defense.

State v. Adams, 31 Wn. App. 393, 395-97, 641 P.2d 1207 (1982). Accord: State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993).

[T]he State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged

State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).



D. CONCLUSION

In a prosecution for rape of a child in the third degree, the statute by its own terms applies only if the defendant was "the perpetrator." In this case, who was "the perpetrator" is an issue of fact.

When the defense presents evidence that the defendant was not "the perpetrator" of the sexual contact or intercourse, the State bears the burden of proving beyond a reasonable doubt that the defendant was "the perpetrator" of the act.

This statutory interpretation resolves the issue in this case without having to rely on constitutional concepts of due process and *actus reas*. This Court can resolve this case and provide guidance for the lower courts by implementing the Legislature's intent.

DATED this 9th day of August, 2011.

	
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APPENDIX

§ 9A.44.010. Definitions

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1) (c) or (e) and 9A.44.100(1) (c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically

dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

§ 9A.44.050. Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

§ 9A.44.060. Rape in the third degree

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

§ 9A.44.073. Rape of a child in the first degree

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

§ 9A.44.076. Rape of a child in the second degree

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Rape of a child in the second degree is a class A felony.

§ 9A.44.079. Rape of a child in the third degree

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Rape of a child in the third degree is a class C felony.

§ 9A.44.083. Child molestation in the first degree

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

§ 9A.44.086. Child molestation in the second degree

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

§ 9A.44.089. Child molestation in the third degree

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

§ 9A.44.093. Sexual misconduct with a minor in the first degree

(1) A person is guilty of sexual misconduct with a minor in the first degree when: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim; (b) the person is a school employee who has, or knowingly causes

another person under the age of eighteen to have, sexual intercourse with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, if the employee is at least sixty months older than the student; or (c) the person is a foster parent who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with his or her foster child who is at least sixteen.

(2) Sexual misconduct with a minor in the first degree is a class C felony.

(3) For the purposes of this section:

(a) "Enrolled student" means any student enrolled at or attending a program hosted or sponsored by a common school as defined in RCW 28A.150.020, or a student enrolled at or attending a program hosted or sponsored by a private school under chapter 28A.195 RCW, or any person who receives home-based instruction under chapter 28A.200 RCW.

(b) "School employee" means an employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.

§ 9A.44.096. Sexual misconduct with a minor in the second degree

(1) A person is guilty of sexual misconduct with a minor in the second degree when: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual contact with the victim; (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with an

enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, if the employee is at least sixty months older than the student; or (c) the person is a foster parent who has, or knowingly causes another person under the age of eighteen to have, sexual contact with his or her foster child who is at least sixteen.

(2) Sexual misconduct with a minor in the second degree is a gross misdemeanor.

(3) For the purposes of this section:

(a) "Enrolled student" means any student enrolled at or attending a program hosted or sponsored by a common school as defined in RCW 28A.150.020, or a student enrolled at or attending a program hosted or sponsored by a private school under chapter 28A.195 RCW, or any person who receives home-based instruction under chapter 28A.200 RCW.

(b) "School employee" means an employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.

§ 9A.44.100. Indecent liberties

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) (a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

(b) Indecent liberties by forcible compulsion is a class A felony.

§ 9A.44.160. Custodial sexual misconduct in the first degree

(1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:

(a) When:

(i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and

(ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision; or

(b) When the victim is being detained, under arrest[,], or in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.

(2) Consent of the victim is not a defense to a prosecution under this section.

(3) Custodial sexual misconduct in the first degree is a class C felony.

§ 9A.44.170. Custodial sexual misconduct in the second degree

(1) A person is guilty of custodial sexual misconduct in the second degree when the person has sexual contact with another person:

(a) When:

(i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and

(ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision; or

(b) When the victim is being detained, under arrest, or in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.

(2) Consent of the victim is not a defense to a prosecution under this section.

(3) Custodial sexual misconduct in the second degree is a gross misdemeanor.

DECLARATION OF SERVICE BY MAIL

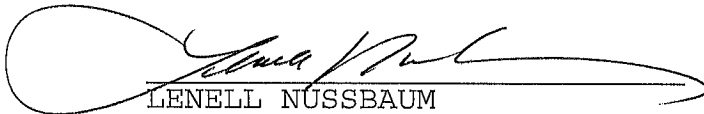
I declare under penalty of perjury that on August 9, 2011, I placed a copy of this document in the United States Mail Service, postage prepaid, addressed to:

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Signed August 9, 2011, in Seattle, Washington.


LENELL NUSSBAUM